Michael K. Jeanes, Clerk of Court
*** Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000510-001 DT 01/02/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

BETTY J TALAMO

ALICIA MYKYTA

v.

KAYLA PETERSON (001)
BREANNA PETERSON (001)

RONALD L JONES

MARYVALE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2012–058834FC.

Defendants Appellants Kayla Peterson and Breanna Peterson (Defendants) appeal the Maryvale Justice Court's determination that they were guilty of a forcible detainer. Defendants contend the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On March 16, 2012, Plaintiff's counsel had a 5-day notice delivered to Defendants Kayla Peterson and Breanna Peterson informing both that they needed to turn back possession of the leased premises to Plaintiff. On March 23, 2012, Plaintiff Betty J. Talamo, executor, on behalf of the Cummins Family Trust, filed a special detainer action against Kayla Peterson and Breanna Peterson. Plaintiff claimed Kayla Peterson took possession of the premises pursuant to a written lease but the lease had since expired. Plaintiff also alleged (1) Defendants failed to pay rent; (2) damaged the premises as well as property on the premises; and (3) failed to perform agreed to repairs and maintenance which were to be completed in exchange for unpaid rent for the month of December, 2011. Plaintiff additionally asserted Defendants remained in possession of the premises for the months of January, February, and March, 2012, without paying rent and after Plaintiff's demand that they vacate the property. A Summons accompanied the Complaint and informed the Defendants the matter was set for March 30, 2012, at 1:00 P.M.

The parties were served by post and mail service on March 23, 2012. The Affidavit of Service indicates (1) two sets of documents were posted in a conspicuous place on the front door of the property; (2) a certified copy of the documents was mailed to both Kayla Peterson and Breanna Peterson that same date.

On March 30, 2012, the parties were notified the matter had been set for trial and that Defendants were required to file an Answer. The Special Detainer Trial Notice from the Maryvale Justice Court included the following language:

> Forcible Detainer/Special Detainer Trial Notice
>
> Your Forcible Detainer/Special Detainer has been set for Trial. You are REQUIRED TO FILE AN ANSWER with this Court on ARRAIGNMENT DATE (first court appearance). BY LAW, A $44.00 FILING FEE IS REQUIRED TO BE PAID WITH YOUR ANSWER. [Sic.]
>
> If your Answer is not filed with the appropriate fee of $44.00 or with a request for waiver or deferral of the fee, on the Arraignment date (first court appearance). THE TRIAL WILL BE VACATED AND A DEFAULT JUDGMENT WILL BE AWARDED TO THE PLAINTIFF. [Sic.]

The matter was set for April 2, 2012, at 1:30 p.m. The Notice indicates a copy was hand delivered to Plaintiff and Defendant on March 30, 2012.

The trial court held a trial on April 2, 2012. Kayla Peterson appeared at the trial although she did not file any Answer.[1] The trial court record does not reflect Breanna Peterson filed any Answer or made any appearance.[2]

Teresa Thompson—a beneficiary of the Cummins Family Trust Fund—testified on Plaintiff's behalf and stated (1) Defendant entered a rental agreement on December 1, 2011, with a monthly rental of $550.00; but (2) no rent was due for the month of December because there was a trade out arrangement for that month.[3] She stated the trade-out arrangement was for Defendant to fix two broken windows and put new doorknobs and locks on the doors.[4] Although Defendant did the work, she did not provide Plaintiff with keys to the home and failed to pay any rent for the months of January, February, or March.[5] Ms. Thompson identified several five-day notices and stated (1) Defendant continued to occupy the residence and (2) Plaintiff was

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[1] Trial transcript, April 2, 2012, at p. 5, ll. 16–19.

[2] The trial court asked who represented "the Petersons" and Defendant Kayla Person responded. Trial transcript, at p. 4, ll. 12–16. However, a non-attorney cannot represent another. See *Byers-Watts v. Parker*, 199 Ariz. 466, 469, ¶ 13, 18 P.3d 1265, 1268, ¶ 13 (Ct. App. 2001) holding:

> "Rule 31(a)(3), Rules of the Arizona Supreme Court, states that "no person shall practice law in this state ... unless he is an active member of the state bar." Without question, representation of another in court proceedings constitutes the "practice of law." *See In re Fleischman,* 188 Ariz. 106, 110, 933 P.2d 563, 567 (1997) ("The practice of law consists of 'those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries ...' includ[ing] ... representing another before a court....") (quoting *State Bar of Ariz. v. Ariz. Land Title & Trust Co.,* 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961)).

[3] *Id*. at p. 7, ll. 18–25; p. 8, ll. 1–8.

[4] *Id*. at p. 8, ll. 7–17.

[5] *Id*. at p. 8, ll. 18–25; p. 9, ll. 1–2.

requesting that Defendants vacate the premises.[6] Ms. Thompson also stated the unpaid rent was $1,650.00.[7] She added she had been unsuccessful in obtaining access to inspect the premises.[8] Defendant Kayla Peterson failed to cross-examine this witness and Plaintiff rested her case.[9]

Defendant Kayla Peterson testified she was living at the premises per a lease agreement and said she paid her rent in advance until August. She said:

> The lease agreement that she signed states that I had paid her ahead of time - - we got it notarized - - until August. That was on the lease agreement that she signed.
>
> And so we weren't going to be moving out until August, and then she showed up with another family that she had signed a lease with, and we had called the police, and the police had asked her to leave because we had the lease agreement.
>
> And then she had came [sic.] to me to - - come by to sit outside, so I got the order of protection against her, and she admitted it, and the judge said it was still in effect and she continued.[10]

On cross-examination, Plaintiff's counsel asked Defendant if she had the original lease in court. Defendant said Teresa Thompson signed the original lease.[11] Thereafter Plaintiff's counsel queried about Ms. Peterson's hourly rate of pay and asked how at $8.00 per hour salary—and with the two dependents she claimed—she was able to arrive at a $3,600 income tax refund.[12] Plaintiff's counsel also asked (1) if the income tax refund came electronically or as a check; and (2)—after learning it came as a check—where Defendant cashed the check.[13] Defendant responded she cashed the check at PLS Check Cashing and said they took three to five hundred dollars as their fee for cashing the check.[14] Plaintiff's counsel continued to question about the income tax refund which he calculated to be at least $4,000.00 based on Defendant's testimony and Defendant asserted she was also working at another telemarketing place plus cleaning houses.[15] She stated she did not know if the people she cleaned for withheld federal income tax but they did not give her a W-2.[16]

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[6] *Id*. at p. 9, ll. 4–25; p. 10, ll. 1–14.
[7] *Id*. at p. 10, ll. 15–17.
[8] *Id*. at p. 10, ll. 18–25; p. 11, ll. 1–15.
[9] *Id*. at p. 12, ll. 3–8.
[10] *Id*. at p. 12, l. 25; p. 13, ll. 1–12.
[11] *Id*. at p. 14, ll. 4–7.
[12] *Id*. at p. 14, ll. 18–25; p. 15, ll. 1–18.
[13] *Id*. at p. 16, ll. 9–25; p. 17, ll. 1–7.
[14] *Id*. at p. 17, ll. 4–18.
[15] *Id*. at p. 17, ll. 19–25.
[16] *Id*. at p. 18, ll. 2–5.

Plaintiff's counsel recalled Terri Thompson as a rebuttal witness. Ms. Thompson said (1) she had not seen the lease Defendant proffered before; and (2) the name "Teresa Thompson" was not her handwriting.[17] She also stated:

> My signature is short, small and scribble. The T here looks like an L. The R isn't my R, The H is too big. There's no N at the end of the name.[18]

Ms. Thompson provided her driver's license to the court. Plaintiff's counsel requested that the trial court look at the signatures on both the purported lease and the driver's license. The trial court commented: "They are entirely different, completely."[19]

Defendant cross-examined Ms. Thompson and asked why Ms. Thompson had testified at a separate hearing[20] that she signed the lease and identified her signature. Ms. Thompson responded that the document she was shown on March 2, was "completely different".[21] Ms. Thompson repeated that the agreement Defendant was showing the judge "right now" was different from the contract Defendant showed to another judge at a different proceeding.[22]

The trial court granted judgment for Plaintiff. Defendant filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

> *A. Did The Trial Court Abuse Its Discretion By Failing To Consider Testimony and Self Authenticating Evidence That Defendant Kayla Peterson Pre-Paid Her Rent Through August.*

Defendants alleged the trial court reached its conclusion without considering evidence favoring Kayla Peterson. To support this allegation, Defendants alleged the trial court ignored a self-authenticating document—the original lease. Instead, according to Defendants, the trial court based its judgment on the similarity in the handwriting on the "original lease" as compared with the handwriting on Teresa Thompson's driver's license. Defendants then alleged the "decisions of the lower court" not to preserve the evidence is an abuse of discretion.

Standard of Review

Both parties agree this Court reviews the trial court's determination of the factual issues—as to whether Plaintiff proved the special detainer by a preponderance of the evidence—under an abuse of discretion standard. An abuse of discretion occurs when the court's discretion is

[17] *Id*. at p. 19, ll. 4–14.
[18] *Id*. at p. 19, ll. 16–18.
[19] *Id*. at p. 20, l. 5.
[20] Defendant referred to a hearing on an Order of Protection.
[21] *Id*. at p. 20, ll. 13–17.
[22] *Id*. at p. 21, ll. 1–25.

exercised in a manner that is manifestly unreasonable or based on untenable grounds or untenable reasons. *Charles I. Friedman, P.C. v. Microsoft Corp*., 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006); *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 11, 178 P.3d 511, 514, ¶ 11 (App.2008). Where this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise the trial court's determination if there is a reasonable basis for the order. In discussing discretion, the Arizona Supreme Court, in *State v. Chapple*, held:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted). Here, the trial court assessed testimony from Defendant as well as from Ms. Thompson. Defendant asserted the lease she presented was the lease she entered with Ms. Thompson. Ms. Thompson denied this allegation and stated (1) she had not seen the proffered lease before; and (2) the handwriting on the lease did not match her own signature. Although Defendant attempted to challenge Ms. Thompson's assertion by claiming Ms. Thompson had agreed the lease was an original at a separate and earlier proceeding, there is no indication that the proffered lease on March 30, 2012 was identical to the lease shown to a different court on March 2, 2012. Defendant claimed the documents were the same while Ms. Thompson said they were different. This is a classic example of a situation where there are differing factual assertions. As stated in *Chapple, id*., these are considerations which "can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him."

Evidence

Although Defendants asserted the trial court reached is conclusion "without consideration of the evidence that favored Kayla Peterson"[23] Defendants did not demonstrate the trial court did not consider Defendant's evidence. Defendants simply asserted the trial court did not look at the

[23] Defendants' "Memorandum of Appeal" at p. 7, ll. 1–2.

notary stamp[24] but provided no reference to show what the trial court did or did not look at. Furthermore, while Defendants asserted the trial court failed to preserve either (1) the presented lease; or (2) Teresa Thompson's driver's license, neither party asked that either of these documents be entered into evidence. It is not the job of the trial court to "preserve evidence" unless a party to the proceeding requests the evidence be admitted.

Furthermore, Defendants' assertion that the copy of the provided lease is self-authenticating also fails. Self-authenticating documents are those that are so inherently reliable that they are deemed to be completely trustworthy. Evidence is usually authenticated by using extrinsic evidence. Ariz. R. Evid. Rule 901(a) states the requirement of authentication or identification as a condition precedent is satisfied by evidence that is sufficient to support a finding that the matter in question is what its proponent claims. Although acknowledged documents are self-authenticating according to Ariz. R. Evid. Rule 902(8), Defendants presented no evidence indicating the document she presented in court was the original of the lease as opposed to a copy of the lease or that all of the pages of the lease were in their original form. Defendants also did not seek to have the lease admitted. Therefore, she did not preserve the evidence for this appeal and this Court cannot determine if the trial court erred by failing to accept Defendant's testimony that the presented lease was the original lease agreement.

Plaintiff's witness challenged the veracity of the presented lease. Thus, the document lacked the "guarantee of trustworthiness attendant with the other exceptions to the hearsay rule" *Ogden v. J.M. Steel Erecting, Inc*., 201 Ariz. 32, ¶ 38, 31 P.3d 806 ¶ 38 (Ct. App. 2001) and not subject to being self-authenticated. In *State v. King*, 213 Ariz. 632, 636, ¶ 11, 146 P.3d 1274, 1278, ¶ 11 (Ct. App. 2006) the Arizona Court of Appeals—in commenting on authenticating documents—said:

> The judge does not determine whether the document is authentic, only whether there is some evidence from which the trier of fact could reasonably conclude that it is authentic. Once admitted, the opponent is still free to contest the genuineness or authenticity of the document, and the weight to be given the document becomes a question for the trier of fact.

Because this case was tried by the judge and not a jury, the trial court had the ability to determine if the proffered lease was the lease Plaintiff signed. The trial court was not mandated to accept Defendant's version that the document was authentic and Plaintiff challenged the authenticity of the lease when Plaintiff's witness maintained (1) she had not seen the proffered lease before; and (2) the signature on the lease was not her own.

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[24] *Id*. at p. 7, l. 11.

This Court notes the trial court did not state the reasons for its ruling. Instead, the trial court commented it had not heard a defense as to the "three months owing". This does not, in and of itself, indicate the trial court did not "consider at all" Defendant's testimony. It could mean the court rejected her testimony and found it to be not credible.

B. Did The Trial Court Abuse Its Discretion By Entering Judgment Against Defendant Breanna Peterson "Without Her Appearance And Without Evidence Presented Against Her".

Breanna Peterson was a co-defendant. She was named in the Summons and Complaint and failed to file any answer challenging Plaintiff's allegations. Rule 7, RPEA, mandates that a defendant answer the complaint.

> On or before the initial return date, the defendant shall answer, indicating whether the defendant admits or denies the allegations of the complaint. If the defendant does not have sufficient information to determine whether or not an allegation of the complaint is true, the defendant shall so state. The defendant's answer shall also state in short and plain terms any defenses the defendant wishes to assert to the plaintiff's claims.

If a defendant fails to file an answer, the defendant must inform the trial court about any defenses at the time of the initial appearance. Rule 11(b), RPEA states that at the initial appearance, the defendant may file an oral answer on the record. However, Rule 11(e) states in relevant part:

> The defendant shall not be permitted to advance allegations at a continued trial that were not included in a written answer or counterclaim or in an oral answer made at the initial appearance.

Because Defendant Breanna Peterson neither filed an answer nor appeared at the time of the initial appearance, she would not be able to advance any defenses to the special detainer action.

Pursuant to RPEA, rule 13(b)(3), the trial court may enter a default judgment if the defendant fails to appear in person or through counsel on the initial return date and no continuance is granted. However, in order to enter a default, the trial court must determine that the conditions of rule 13(a)(1)–(4) are met. These conditions mandate that the trial court determine whether (1) the service of the summons and complaint was proper, timely, and included all mandated information; (2) the occupant received a proper termination notice; (3) the alleged facts indicate the plaintiff has a superior right of possession; and (4) whether there was a partial payment and the effects of any partial payment on plaintiff's claim. Here, there was no claim of partial payment and waiver. This Court does not know if the trial court made the required determination as the record is silent about the considerations the trial court used in arriving at its decision. However, the court file reflects Defendant Breanna Peterson received her required notices, summons and complaint in the same manner as did her co-defendant—Kayla Peterson—and no-

one objected on the basis of lack of a termination notice or improper or faulty service. Thereafter, the trial court entered judgment against Breanna Peterson.

Defendants now allege the "the court's decision to sign the form of order, without making appropriate adjustments such as striking Breanna Peterson's name was an abuse of its discretion."[25] Defendants failed to present any authority indicating that trial courts sua sponte strike the names of litigants. Although trial courts have inherent authority to strike claims sua sponte *Acker v. CSO Chevira,* 188 Ariz. 252, 254, 934 P.2d 816, 818 (Ct. App.1997), they are not required to do so and only rarely exercise that power. Trial courts have stricken claims when (1) the claim is patently frivolous; and (2) when a frivolous in forma pauperis complaint is filed. As stated in *Acker v. CSO, Chevira, id.*, 188 Ariz. at 254, 934 P.2d at 818:

> A court's inherent authority "may be defined as such powers as are necessary to the ordinary and efficient exercise of jurisdiction." *State v. Superior Court,* 39 Ariz. 242, 247–48, 5 P.2d 192, 194 (1931) (citation omitted). We recently referred to the trial court's "inherent screening power" and its "inherent power to dismiss facially invalid claims" in post-conviction relief proceedings. *State v. Curtis,* 185 Ariz. 112, 114–15, 912 P.2d 1341, 1343–44 (App.1995) (affirming sua sponte dismissal of a petition for post-conviction relief which contained "obviously precluded" claims). In the *in forma pauperis* context, however, the court's "inherent screening power" has generally not been used to summarily clear the docket of complaints which fail to state a claim upon which relief can be granted; it has generally been used to get control of inmates who have proven themselves to be abusers of the *in forma pauperis* privilege by filing frivolous actions.

Plaintiff's Complaint was not patently frivolous as Plaintiff was seeking possession of Plaintiff's premises. The trial court was not required to strike Breanna Peterson's name sua sponte. Furthermore, even after receiving the judgment, Breanna Peterson did not seek any relief from the trial court's judgment per RPEA, Rule 15. Finally, Defendants failed to demonstrate how the trial court abused its discretion by not striking Defendant Breanna Peterson's name.

C. Did The Trial Court Fail To Keep An Adequate Record Of The Proceedings And Is This Failure Grounds For A Trial De Novo.

Defendants alleged the trial court erred by failing to admit Defendant's copy of the lease on its own motion. Defendants provided no authority mandating a trial court admit evidence on its own motion. Indeed, in *Gordon v. Liguori*, 182 Ariz. 232, 235, 895 P.2d 523, 526 (Ct. App. 1995), the Arizona Court of Appeals stated:

> Defendants are correct that plaintiffs did not specifically ask the court, either in their response to defendants' motion *in limine* or their motion for a new trial, for permission to offer evidence of such an agreement. Nor did they offer such

[25] Defendants/ Memorandum of Appeal, *id*., at p. 8, ll. 13–14.

> evidence at trial. Instead, they merely asked to comment on each defendant's failure to present their retained expert's testimony that the other defendant was at fault. The court, therefore, could not have erred because this issue was never presented to it.

When a party fails to request the admission of evidence, the trial court has no obligation to admit the unrequested evidence.

Arizona has no law on this specific point. Consequently, this Court will look to authority from our sister states. In *Reyes v. Reyes*, 946 S.W.2d 627, 630 (Tex. App. 1997), the Texas Court of Appeals addressed a situation where there was no admitted evidence and stated:

> The appellant argues in his brief that he filed in the trial court a "Declaration of Inability to Pay Child Support." This document, however, was not admitted into evidence at trial and, therefore, may not be considered by this court in deciding whether the trial court abused its discretion in issuing its child support order. *Vanscot Concrete Co. v. Bailey*, 862 S.W.2d 781, 783 (Tex.App.—Fort Worth 1993), *aff'd*, 894 S.W.2d 757 (Tex.1995). The appellant failed to present any other evidence of his net resources.

In *Frank v. County of Los Angeles*, 149 Cal. App. 4th 805, 815, 57 Cal. Rptr. 3d 430, 438 (2007) the California Court of Appeals held:

> At oral argument, counsel for plaintiffs conceded that reliance on exhibits not admitted during the liability phase of trial was improper. It is axiomatic that in reviewing the liability aspect of a judgment based on a jury verdict, we may not review exhibits identified, but not admitted at trial. (See *USLIFE Savings & Loan Assn. v. National Surety Corp.* (1981) 115 Cal.App.3d 336, 343, 171 Cal. Rptr. 393 [facts, events, documents or other matters urged by party not admitted into evidence cannot be included in the record on appeal and are outside scope of review].)

Similarly, in *Rogers v. Wackenhut Services, Inc.*, 921 So. 2d 1076, 1080-81 (La. App. 5 Cir. 1/17/06) the Louisiana Court of Appeals ruled:

> The record does not reflect whether this issue was placed before the worker's compensation judge. In addition, Appellee filed a Motion to Strike the affidavit and other documents attached to Appellants' brief that was not admitted into evidence in the trial court. As this Court has no authority to consider evidence presented for the first time in the appeal, we cannot consider the documents. Thus, we will not address this issue and will furthermore grant appellee's Motion to Strike.

Furthermore, Plaintiff has agreed this Court may consider the lease submitted as an Exhibit to Defendants' appellate memorandum as part of the record. Because (1) Plaintiff agreed this

Court may review the lease, and (2) Defendants premised the request for a trial de novo on Plaintiff stipulating the Lease (Defendants' Exhibit 3 to Defendant's Memorandum on Appeal at p. 9, ll. 6–12), there is no need for a trial *de novo*.

Finally, pursuant to the agreement, this Court reviewed Defendants' Exhibit 3 and noted the handwritten language re Defendant paying $3,600.00 "for the first 6 months. Her next payment is not due t [sic] August 2-12." [Sic.] This handwritten provision was not initialed by either party. Plaintiff challenged its accuracy and stated she did not sign the document and had not seen it before. Having reviewed the lease, this Court does not find the trial court abused its discretion in granting judgment to Plaintiff.

III. CONCLUSION.

Because (1) trial court rulings on the admission or exclusion of evidence are not disturbed on appeal absent a clear abuse of discretion; and (2) this Court does not find the trial court clearly abused its discretion in granting judgment to Plaintiff, this Court concludes the Maryvale Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Maryvale Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Maryvale Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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